No. 90-1029

In the Supreme Court of the United States

October Term, 1991

EASTMAN KODAK COMPANY,

Petitioner,

v.

IMAGE TECHNICAL SERVICES, INC., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Brief Amicus Curiae of The California State Electronics Association (CSEA); The Appliance Servicers Division of CSEA (ASD); The Independent Warranty Servicers Division of CSEA (IWS); The Arizona State Electronics Association (ASEA); The Television Service Association of Arkansas; NESDA of Colorado; The Electronics Service Association of Connecticut (TELSA); The Florida Electronics Service Association; The Georgia Electronic Service Dealers Association; The Idaho Professional Electronics Association (IPEA); The Electronic Service Dealers Association of Illinois; The Indiana Electronic Service Association; The Indiana Satellite Dealers Association; The Television Service Association of Iowa; The Kansas Electronics Association; The Kentucky Electronic

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Association; The Television and Electronics Services Association of Long Island; The Electronic Technicians Guild of Massachusetts; The Metropolitan Electronics/Television Service Dealers Association; The Electronic Service Dealers Association of Michigan; The Missouri Electronics Service Dealers Association; The Nebraska Electronics Service Association; The Electronics Technicians Association/Greater New Orleans; NESDA/New York State; The Nevada State Electronics Association; The Television and Radio Association of New England (TRANE); The Western New York Electronics Guild; The North Carolina Electronic Service Dealers Association; NESDA of Ohio; The Oregon Professional Electronics Association; TESA/St. Louis; The Tennessee Electronics Sales/Service Dealers Association; The Texas Electronics Association; The Vermont Electronic Technicians Association; The Virginia Electronics Association; NESDA of Washington; The Wisconsin Electronics Sales/Service Association;

The Florida Service Agreement Association; American Way Service Corporation, S.E. Vehicle Protection Plan; Amira Services, Inc.; Atlas Service, Inc.; Broward Factory Service; Climate Control Services, Inc.; Encore Service Systems, Inc.; E.R.A. Electronic Realty Associates; Guaranteed Homes, Inc.; Homeowners Association of America, Inc.; Phoenix American Insurance Group; Total Appliance & Air Conditioning, Inc.; United Service Protection, Inc.; United States Warranty Corporation; Universal Warranty Corporation; Video Aid Corporation;

Andrews Electronics; Audio Video Parts Incorporated; Fox International Incorporated; Pan-Son Electronics; Forms N, Printing Incorporated; Sencore; and The Computer Dealers and Lessors Association, Inc. (CDLA)

In Support of Respondents

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In Support of Respondents

INTEREST OF AMICUS CURIAE

The Amici represent substantial sectors of the United States economy related to the servicing and maintenance, ownership, leasing, remarketing, and end use of equipment and products sold to businesses and consumers in the United States.[1]

The Amici are:

1) Thirty-seven national and state associations comprised of member companies and individuals engaged in the servicing of electronic products to both businesses and consumers ("Electronics Associations");

2) A state association and fifteen of its member companies which provide warranty coverage to consumers ("Warranty Association");

3) Individual companies which distribute parts and products to the electronics service industry ("Distributors" and "Suppliers");

4) A manufacturer and designer of diagnostic equipment for the entire electronics service industry; and

5) A national association of companies which own, lease, and remarket computers and other equipment to businesses and end users ("Owners and Lessors Association").

The independent interests of the Amici converge in this case in that all of the Amici are themselves consumers and end users of equipment and products. They are also either direct service and warranty service providers to consumers, owners, or end users of equipment and products that require maintenance or service, or

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[1]This Brief is filed pursuant to Rule 37.2 of the Rules of this Court, accompanied by the written consent of all parties.

providers of equipment and products to the service industry, or lessors and remarketers of computers and equipment to end users.

The Amici do not wish to have consumer choices and options removed by reducing competition in the service industry.

If consumer choice and competition in the service industry is reduced by placing the warranty and aftermarket servicing and maintenance of equipment and products under the control of the companies who are original equipment manufacturers ("OEM"s):

1) all of the Amici will suffer substantial losses in both income and jobs;

2) consumers and end users will pay more for and receive less efficient service and maintenance;

3) owners will lose substantial monies invested in the equipment and products; and

4) the major sector of the United States economy, i.e. service, will significantly contract.

A. The Electronics Associations

The Electronics Associations[2] consist of member companies and individuals who service consumer electronics products.[3]

The members of the Electronics Associations and others in the same business have approximately 40,000 separate establishments with approximately 3 employees per establishment, representing approximately 120,000 jobs.[4]

The members of the Electronics Associations are specially trained in the servicing of the various products and engage in constant retraining through classes, seminars, and private schools. In order to perform their service functions, the members of the Electronics Associations must make substantial financial investments in facilities, diagnostic equipment, technical literature, and replacement parts for numerous manufacturers and brand name products.

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[2]The Electronics Associations consist of: The California State Electronics Association (CSEA); The Appliance Servicers Division of CSEA (ASD); The Independent Warranty Servicers Division of CSEA (IWS); The Arizona State Electronics Association (ASEA); The Television Service Association of Arkansas; NESDA of Colorado; The Electronics Service Association of Connecticut (TELSA); The Florida Electronics Service Association; The Georgia Electronic Service Dealers Association; The Idaho Professional Electronics Association (IPEA); The Electronic Service Dealers Association of Illinois; The Indiana Electronic Service Association; The Indiana Satellite Dealers Association; The Television Service Association of Iowa; The Kansas Electronics Association; The Kentucky Electronic Association; The Television and Electronics Services Association of Long Island; The Electronic Technicians Guild of Massachusetts; The Metropolitan Electronics/Television Service Dealers Association; The Electronic Service Dealers Association of Michigan; The Missouri Electronics Service Dealers Association; The Nebraska Electronics Service Association; The Electronics Technicians Association/Greater New Orleans; NESDA/New York State; The Nevada State Electronics Association; The Television and Radio Association of New England (TRANE); The Western New York Electronics Guild; The North Carolina Electronic Service Dealers Association; NESDA of Ohio; The Oregon Professional Electronics Association; TESA/St. Louis; The Tennessee Electronics Sales/Service Dealers Association; The Texas Electronics Association; The Vermont Electronic Technicians Association; The Virginia Electronics Association; NESDA of Washington; and The Wisconsin Electronics Sales/Service Association.

[3]i.e. TVs, VCRs, camcorders, stereo equipment, facsimile machines, monitors, close-circuit/security TV equipment, automobile stereo equipment, satellite equipment, and, in some instances, computer and photocopier equipment.

[4]This estimate is made by the Electronics Associations and does not include in-house service employees of manufacturers who perform the same services on the same equipment, which is estimated at approximately 30,000 jobs.

B. The Warranty Association

The Florida Service Agreement Association is comprised of approximately 27 companies in the state of Florida[5] which provide service under warranty agreements to consumers and others for automobiles, homes, and appliances. Each of the member companies maintains a service facility and employs between 6 and 150 people.

All of the employees of the member companies are specially trained in their respective fields and undergo continuous updating in their training. Each of the companies has a substantial investment in its facility and equipment used to perform the services. The member companies purchase replacement parts from both OEMs of brand name products and those companies which manufacture generic parts for such brand name products, and maintain inventories of such parts.

C. The Distributors and Suppliers

Andrews Electronics, Audio Video Parts Incorporated, Fox International Incorporated, and Pan-Son Electronics are companies which purchase replacement parts and supplies from OEMs and distribute such to the service industry. The purchases are made from both domestic and foreign manufacturers of brand name products[6] and from the various manufacturers of generic

[5]Member companies of The Florida Service Agreement Association also participating individually in this brief are: American Way Service Corporation, S.E. Vehicle Protection Plan; Amira Services, Inc.; Atlas Service, Inc.; Broward Factory Service; Climate Control Services, Inc.; Encore Service Systems, Inc.; E.R.A. Electronic Realty Associates; Guaranteed Homes, Inc.; Homeowners Association of America, Inc.; Phoenix American Insurance Group; Total Appliance & Air Conditioning, Inc.; United Service Protection, Inc.; United States Warranty Corporation; Universal Warranty Corporation; and Video Aid Corporation.

[6]i.e. Zenith, Sony, Panasonic, and others.

parts[7] which are used in almost all electronic equipment irrespective of brand name.

It is estimated that approximately 5,000 people are employed by distributors in the distribution of original equipment replacement parts.[8]

Forms N, Printing Incorporated and other similar companies supply invoice and other forms to the service industry. Most of these companies are small, with 12 employees or less.

D. A Manufacturer and Designer of Diagnostic Equipment

Sencore is a manufacturer and designer of diagnostic and measuring/test equipment for the electronics service industry. It also provides constant upgrading seminars to such industry. It is estimated that approximately 10,000 people are employed in the manufacture and design of diagnostic and measuring/test equipment.

E. The Owners and Lessors Association

The Computer Dealers and Lessors Association, Inc. ("CDLA") is a nonprofit trade association of over 350 companies whose primary business is leasing and remarketing of computers and other information technology equipment. The dollar volume in the leasing and remarketing business was approximately $25 billion in 1990.

CDLA members are concerned with protecting and extending the useful life of equipment, and preserving the economic value of equipment by maintaining a strong leasing and secondary market. CDLA views independent

[7]i.e. capacitors, idler wheels, resistors, rubber tires, transistors, video heads (in some instances), and others.

[8]This estimate, made by the Distributors, does not include those people employed by the companies which import these parts.

service organizations as a vital part of this process. CDLA believes that independent service organizations provide customers competitive alternatives and fulfill market demands, particularly when a manufacturer is not meeting the demands of the market.[9]

SUMMARY OF ARGUMENT

The United States has become a service economy with service related activities now comprising over 60% of the Gross National Product (GNP) and growing. In 1988 the total value of service was almost $3 trillion, out of a total GNP of $4.8 trillion. Approximately 250,000 service organizations provide service to products.

"High tech" service was estimated to be over $250 billion in 1988, with $100 billion relating to the servicing of electronic, electrical or electrical mechanical equipment.

In the past 10 years service organizations which are not owned by manufacturers have emerged to provide services to consumers and end users. Some of these service organizations consist of divisions of major computer manufacturers who service computers of their competitors.

In the computer industry the providing of services and maintenance comprise approximately $24.7 billion.

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[9]This occurs when manufacturers:

1) choose not to or cannot meet the customer's demands for service;
2) charge excessive prices for service;
3) charge excessive fees for certifying equipment as eligible for their maintenance;
4) have unreasonable or unpredictable policies and practices for certification; or
5) use maintenance policies or pricing to force the purchase of new equipment.

In the automobile industry revenues for aftermarket products are approximately $155.5 billion at the retail level, and revenues for services are approximately $90 billion to $100 billion annually.

Consumer demand has divided the marketplace into original equipment, parts, and service. Without such demand such markets will cease. Restrictive policies, such as those in this case, will also cause competition to decline and consumer welfare to decrease.

Kodak's policies of tying parts to service consist of a factual tying arrangement which is not of the usual form of tying original equipment to parts or service. The application of interbrand competition to Kodak's policies is a new extension of the market definition in tying arrangement cases.

The theory of interbrand competition, as related to copier systems, does not reflect the marketplace or the consumer's choices.

The issue of market power, and particularly which market, is the crux of this case. Copier equipment is not sold as systems of equipment, parts, and service. Original equipment is not an appropriate market to measure market power since original equipment is not part of the tying arrangement. The theory of interbrand competition is inappropriate when a physically and economically unique product is the tying product.

An extension of the definitions of product markets or the relevant market is not appropriate and would result in the disappearance of the competitive service industry and all of its price and efficiency benefits to consumers.

ARGUMENT

I.

SERVICE HAS REPLACED MANUFACTURING AS THE MAINSTAY OF THE UNITED STATES ECONOMY

As the United States economy matured and its rate of growth lessened, manufactured equipment and products have begun to achieve saturation levels. In addition, new equipment and products are being manufactured with longer life cycles through the use of stronger materials and higher technologies.

These factors, amongst others, have caused the service sector of the economy to expand from its traditional definition to include service and maintenance of equipment and products.[10]

A. Service Related Activities Now Comprise Over 60% of the Gross National Product and Are Growing

During 1988, the total value of service in the United States economy was almost $3 trillion, out of a total GNP of $4.8 trillion. This represents over 60% of the total economy and is growing. The equipment service market alone will continue to grow at a rate of more than 17% into the 1990s.[11]

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[10]As may be expected with such expansion, research is being done and continuing studies are now available about the service sector and its components as a distinct sector of the economy. These studies clearly demonstrate that the mainstay of the United States economy is now service.

Some of the published materials will be referred to herein under the "Brandeis Brief" concept. *Muller v. Oregon* 208 U.S. 412, 421 (1908), in which the Court stated, ". . . We take judicial cognizance of all matters of general knowledge."

[11]See D.F. Blumberg, *Managing Service as a Strategic Profit Center*, McGraw-Hill, Inc., 1991 ("*Managing Service*"), pp. 37-38. This estimate was based upon statistics from the United States Department of Commerce. At pp. 33-35, the service market is described as follows:

> ". . .Our economy now produces much more 'services' than 'goods,' and this ratio is continuously increasing.
>
> In addition to the traditional services such as banking and finance, health care, retail trade, and transportation and distribution, there are services provided by goods producers. The maintenance and support of plant and equipment used in producing the goods and field and customer services extended by product manufacturers, distributors, and independent service providers to end users are additional services which must also be considered.
>
> These embedded services, added to the 'stand-alone' service businesses and activities, have turned the United States (and most other developed nations) into a predominantly service-oriented economy.
>
> * * *
>
> Of all the service businesses in the United States, the field service organizations have experienced *substantial growth*. These organizations are concerned with the design, installation, maintenance, and repair of field- and plant-based products, equipment, and systems, particularly high technology. Service and support are provided for many types and classes of products, including data processing and office automation equipment, office products (copying equipment, typewriters, etc.), telecommunications equipment, medical electronics equipment, process control and plant automation equipment, and heating, ventilation, and air-conditioning equipment. This particular segment of the total service market is growing at a more rapid rate than the traditional services sector."

[12]*Id.*, p. 35, 37-39.

Approximately 250,000 service organizations provide service to products. Approximately 80,000 have 5 or more service personnel. In 1988 the manufacturing-oriented field service segment of the economy represented a $128 billion market; equipment services and communications, utilities, and government increased this estimate to $547 billion.[12]

B. The "High Tech" Service Market Has Seen and Will See Significant Expansion

The "high tech" service element of the economy has been estimated to be in the range of over $250 billion based on the 1988 Standard Industrial Classification (SIC) data. Approximately $100 billion relates to the servicing of electronic, electrical, or electrical mechanical equipment.[13]

The service market of information systems and equipment, stand-alone communications equipment, integrated networks, building/factory automation, and application of specific "high tech" equipment, accounted for $34 billion in expenditures in 1988. Adding "high tech" services, including design and engineering professional services, software services, facilities management, support, and other logistics services, including depot repair, the total "high tech" market was approximately $57 billion in 1990 and is projected to grow to over $93 billion by 1993.[14]

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[13]See D.F. Blumberg, "*A New Strategic Assessment of the High Tech Equipment Field Service Market and Support Structure in the United States*," 1991, pp. 2 and 7, respectively, for these estimates.

The life cycle costs for equipment are also discussed at p. 2. Generally, over the life cycle of an installed piece of equipment or system, 35% of the initial acquisition price is related to design, integration, installation, and initial warranty service. Expenditures for services that support the equipment or system typically run about 15% of the initial acquisition price on an annual basis. The total cost for equipment or system ownership over a seven year economic life cycle, from initial acquisition through full maintenance and repair services, will be about 2.2 to 2.5 times greater than the initial hardware acquisition cost.

[14]D.F. Blumberg, "*Strategic Directions & New Trends in Third Party Maintenance Market for the 1990's*," 1991 ("*Strategic Directions*"), p. 6.

A particular growth area in the "high tech" markets is the provision of service as a separate line of business for design, engineering, installation, and maintenance and repair. In the past these types of services were provided to the owner or end user by the OEM or by a manufacturer's distributor. In the past 10 years, a class of service organizations has emerged, referred to as third party maintainers ("TPM"s), who provide these services to the end users either with the authorization and support of the OEM or directly.[15]

These TPMs (also known as independent service organizations or "ISOs" or "multivendor service organizations") consist of both independent companies and, in the computer industry, divisions of major computer companies, such as IBM, NCR, DEC, and AT&T.[16]

The total TPM market has grown due to increased customer emphasis on service response and quality, the proliferation of technology and products used by firms without in-house service capabilities, particularly in the area of personal computers, local area networks, workstations, communications controls, and peripheral equipment, a growing interest in service "cost containment," improving service responsiveness and quality, and reducing service problems, including the costs of "downtime" and "fingerpointing." This part of the service market accounted for approximately $11 billion in 1990 and is currently growing at a compounded annual rate of over 15%.[17]

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[15]*Managing Service*, pp. 40-41.

[16]Frost & Sullivan, "*The U.S. Market for Multivendor & Third Party Computer Maintenance*," Report No. A2329/D, Summer 1991 ("*Multivendor and TPM Maintenance Report*"), p. 8.

[17]*Strategic Directions*, pp. 4-7.

C. In the Computer Industry, the Providing of Services and Maintenance Comprise 25% of Revenues of the Top 100 North American Computer Companies

The revenues for these companies is $184.7 billion. Services contribute 11.6% or $21.4 billion to that total and maintenance contributes 13.4% or $24.7 billion.[18]

Third party maintenance revenues had grown from $540 million in 1983 to $1.7 billion in 1987, with a 10% annual growth rate projected over the next five years. The revenues from third party and multivendor maintenance of computers in the United States, which totaled about $2 billion in 1990, are projected to grow to approximately $2.7 billion by 1995 in constant 1990 dollars.[19]

D. In the Automobile Industry the Revenues in the Aftermarket for Merchandised Products and Services Are Greater Than the Estimated Annual Sales of New Automobiles in the United States

The revenues at the manufacturers level for automotive and light truck aftermarket merchandised products was estimated to be $100.6 billion in 1990, with an annual growth rate of 2.3%, to be $112.8 billion in 1995. On the retail side, the market was estimated to be $155.5. billion and $174.1 billion, respectively. The service

[18] *Service News*, Vol. 11, No. 10, September 1991, p. 6, reporting on Datamation Magazine's latest survey, the Datamation 100.

[19] *Multivendor and TPM Maintenance Report*, pp. 1-3. At pp. 7-8 the Report further states that prior to the late 1980s most computer manufacturers had adopted a policy of servicing only their own equipment, and thus lost revenues to TPMs. In the late 1980s these computer manufacturers began to offer maintenance services on systems that did not have any of their own components.

revenues were estimated to be between $90 billion and $100 billion annually.[20]

The retail sale of new automobiles in the United States, for the year 1990, was estimated to be approximately $147.838 billion.[21]

In essence, the retail sale of aftermarket parts for automobiles and light trucks was greater than the sales of new automobiles for the year 1990; the amount expended on service was approximately two-thirds of the sales of new automobiles for the year 1990; and the combined revenues from aftermarket retail sales of parts and service was approximately $250 billion or about 140% of the sales of new automobiles for the year 1990.

II.

CONSUMER DEMAND AND THE REALITY OF THE MARKETPLACE HAVE SEPARATED ORIGINAL EQUIPMENT, PARTS, AND SERVICE AND MAINTENANCE INTO THREE DISTINCT MARKETS

Consumer demand has caused the marketplace in manufactured products such as electronics equipment, automobiles, computers, and office equipment to be

[20] See Frost & Sullivan, "The U.S. Automotive Aftermarket for Merchandised Products & Services," Report No. A2427/T, Spring 1991, p. 1.

[21] Estimate was made by J.D. Power & Associates, a marketing information company which follows and is used by the automobile industry. The estimate was made by reference to *Automotive News, 1991 Market Data Book*, May 29, 1991, pp. 19-27, which contains statistics as to the number of automobiles sold in the United States for the year 1990, and pp. 63-65, which contains statistics as to the prices of automobiles sold in the United States for the year 1990. The average price of the automobile was determined to be $14,500, and this price was multiplied times the number of automobiles sold to obtain the estimate.

divided into separate and distinct markets, as demonstrated by the various participants in each of these markets.

If consumers do not desire to purchase parts from manufacturers other than OEMs or obtain service and maintenance from TPMs, then only the OEMs will remain in these markets.

Practices such as those of Kodak, if adopted by other manufacturers, will artificially cause the markets to contract and stifle the consumer's desires and welfare by removing the consumer's options to obtain parts and service from anyone other than manufacturers.

Such practices are not consistent with the policy that the antitrust laws should benefit the welfare of the consumer, since such conduct artificially displaces the natural functioning of the marketplace.

III.

KODAK'S POLICIES AND CONDUCT ARE A TYING ARRANGEMENT

Kodak makes and sells high volume copiers and micrographics equipment. Kodak also makes or procures replacement parts for use in service and sells service for such equipment (Pet.Br. pp. 2-3).

ISOs service Kodak copiers and micrographics equipment but do not manufacture parts for use in service. ISOs compete against Kodak (Pet.Br. p. 5).

It is undisputed that many of the aftermarket parts for Kodak copiers are unique and only available from Kodak (Pet.App. 7A, 11A).[22]

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[22] 90% of Kodak parts are made outside of Kodak (J.A. 740).

Kodak took steps to prevent ISOs from purchasing parts from sources other than Kodak. ISOs could not buy such parts from the manufacturers due to existing restrictive agreements between the manufacturers and Kodak (J.A. 429). Kodak interfered with an ISO's purchase of parts from an independent broker by confiscating the parts in transit and thus preventing delivery (J.A. 517-518).

Kodak restricted the availability of used machines which could be used for parts (J.A. 510, 511; 505-506, 520, L. 71-74; L. 184-185; J.A. 428).

Kodak sold parts to customers only on the condition that they not be resold to ISOs (L. 178, L. 163, J.A. 428-429; L. 143).

Kodak told ISOs that if they wanted Kodak parts they had to stop servicing Kodak equipment other than their own (L. 143; L. 159).

Kodak also told service customers that ISOs could not get parts (J.A. 466).

Kodak admits to a policy of refusing to sell parts to ISOs (Pet.Br. p. 5) and requiring owners of Kodak equipment not to buy ISO service in order to receive parts from Kodak (Pet.App. 5A). Kodak will sell parts to owners who agree to self-service their machines (Pet.App. 5A).

Kodak has not tied the purchase of original equipment to either the purchase of parts or the purchase of service or both. Kodak has tied the purchase of parts used to repair or service the original equipment to the exclusion of ISOs performing such service.

In essence, Kodak's policy is not the usual tying arrangement in which original equipment which competes in an interbrand market is tied to the purchase of parts or service. Instead, Kodak's policy is one of tying together the two necessary components (i.e. parts which are unique, and service) to maintain such original equipment without tying the original equipment. Without parts or service, Kodak's original equipment would fail and be worthless.

Thus, essentially, Kodak has tied its original equipment to the "combined" purchase of unique parts and service from Kodak.

The effect of Kodak's conduct on the customer has been that (1) Kodak charged up to twice as much as ISOs for service that is lower quality; and (2) some owners of large Kodak equipment packages will pay higher prices for Kodak service rather than switch to competitor's systems (Pet.App. 10A-11A).

Kodak's practice is factually a tying arrangement under the definition set forth in *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5-6 (1958) ("*Northern Pacific*").[23]

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[23]The Court in Northern Pacific described tying arrangements and their effects at pp. 5-7 as follows, in relevant part:

> "However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.
>
> • • •
>
> Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are . . . tying arrangements. [citation omitted]
>
> For our purposes a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. [footnote omitted] Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed 'tying agreements serve hardly any purpose beyond the suppression of competition.' [citation omitted] They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products . . . They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected. [citations omitted] Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most."

Kodak argues that such factual tying arrangement is not unlawful since parts and service are derivative to the sale of Kodak copiers and therefore are not distinct "products" which can be tied together (Pet.Br. pp. 14-15).[24] Kodak primarily contends that an equipment manufacturer that lacks interbrand market power cannot have power, in an antitrust sense, in a wholly derivative aftermarket (Pet.Br. p. 16).

In essence, Kodak is requesting the Court to consider the tying arrangement as if the original equipment had been tied to the parts or service and thereby use original equipment as the tying product. This type of consideration would be a new extension of the market definition in tying arrangement cases. This extension could emasculate the entire concept of tying arrangements, and allow manufacturers to eliminate competition in the aftermarkets of parts and service.

IV.

THE THEORY OF INTERBRAND COMPETITION DOES NOT REFLECT THE REALISTIC MARKETPLACE

Although the theory of interbrand competition controlling parts and service may have initial appeal, such theory does not conform to the today's realistic marketplace.

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[24]Kodak also claims that its conduct was a unilateral refusal to deal, not a tying arrangement, and that Kodak service is not a relevant market which can be restrained or monopolized (Pet.Br. pp. 15-16).

The claim that only interbrand competition exists because consumers buy "systems" and consider the total cost of original equipment, parts, and service over the life cycle of the equipment (Pet.Br. pp 3-4) is also not reflective of the realistic marketplace.

Very few consumers have all of the data to make this judgment available to them at the time of the purchase of the original equipment. Further, the manufacturers do not sell a complete system of original equipment, lifetime parts and lifetime service and maintenance for a single price.

Kodak and manufacturers sell equipment for one price, parts for individual parts prices which are not guaranteed as to price rises, and service and maintenance under separate agreements, or hourly.

Given the structure of the marketplace, the consumer has the option of obtaining the lowest price in each of these three markets from different vendors in each market. The consumer is not bound to purchase the equipment, parts, or service from only the manufacturer.

Even if the consumer is knowledgeable as to the costs in all three markets and considers such before his original equipment purchase, the consumer has the option of determining which vendor in which of the three markets he will use. This option is removed if the consumer is either subject to a manufacturer's tying arrangement of two or all three of the markets, or if the equipment can only function with the manufacturer's parts, i.e. unique parts.

However, even in this situation, the consumer has the option and may negotiate a low price for the equipment from the manufacturer and a low price for service and maintenance from a TPM, thus reducing the overall lifetime costs, even if the manufacturer "gouges" on the parts prices.

Interbrand competition does not have any effect in a marketplace where different entities sell into the different markets, i.e. Kodak versus Canon or Kodak versus Xerox in the original equipment market, the manufacturer versus independent parts suppliers who also compete with each other in the parts market, and the manufacturer versus TPMs who also compete with each other in the service market.

Kodak's theory of interbrand competition could only exist if the original manufacturer was the only person to sell the equipment parts and provide the service.

V.

KODAK'S TYING ARRANGEMENT IS UNLAWFUL ABSENT A NEW DEFINITION OF PRODUCT MARKETS AND RELEVANT MARKET

Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) ("*Jefferson Parish*"), has set forth that a tying arrangement is unlawful where (1) the seller has "market power" in the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all or might have preferred to purchase elsewhere on different terms (466 U.S. 12-18 and cases cited therein); (2) the tie forecloses a "not insubstantial" amount of potential sales for the "tied" product (466 U.S. 16); and (3) the tie links "two separate products" (466 U.S. 18).

The issue of "market power" and particularly which "market," is the crux of this case. The determination of whether market power exists is a function of which market is used: (1) interbrand equipment systems, consisting of original equipment, parts, and service and maintenance; (2) interbrand original equipment; (3)

parts; or (4) service.[25]

This issue is of crucial importance to the Amici since this Court's decision may establish the future structure of the service industry, which represents over 60% of the GNP.

A. Interbrand Competition Does Not Exist in an Integrated Equipment, Parts, and Service Market

In addition to equipment sales, Kodak considers service revenues an important part of its total return on its investments (Pet.Br. p. 8).

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[25] *Jefferson Parish* provided criteria for the assessment of separate product markets, as follows, at pp. 19-23:

> "Our cases indicate, however, that the answer to the question whether one or two products are involved turns not on the functional relation between them, *but rather on the character of the demand for the two items.* [footnote omitted] In *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 73 S.Ct. 872, 97 L.Ed. 1277 (1953), the Court held that a tying arrangement was not present because the arrangement did not link two distinct markets for products that were distinguishable in the eyes of buyers. [footnote omitted] In *Fortner I*, the Court concluded that a sale involving two independent transactions, separately priced and purchased from the buyer's perspective, was a tying arrangement. [footnote omitted] These cases make it clear that a tying arrangement cannot exist unless two separate product markets have been linked.
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> The requirement that two distinguishable product markets be involved follows from the underlying rationale of the rule against tying. The definitional question depends on whether the arrangement may have the type of competitive consequences addressed by the rule. [footnote omitted] The answer to the question whether petitioners have utilized a tying arrangement must be based on whether there is a possibility that the economic effect of the arrangement is that condemned by the rule against tying - that petitioners have foreclosed competition on the merits in a product market distinct from the market for the tying item. [footnote omitted] . . ." [emphasis added]

The underlying thrust of Kodak's argument is that copier equipment is only sold in conjunction with parts and service being provided by Kodak and other OEMs (Pet.Br. pp. 2-3), and that competitive conditions in the equipment markets prevent Kodak from charging supercompetitive prices in any aftermarkets for Kodak parts or service (Pet.Br. p. 4).

Kodak contends that it only has 23% of the high volume copier market and 20% of the micrographics equipment market (Pet.Br. p. 3).[26]

The concurring opinion also agreed in this analysis at p. 39, wherein O'Connor, J., concurring, stated as follows:

> ". . . For products to be treated as distinct, the tied product must, at a minimum, be one that some consumers might wish to purchase separately *without also purchasing the tying product.*" [footnote omitted] When the tied product has no use other than in conjunction with the tying product, a seller of the tying product can acquire no *additional* market power by selling the two products together." [emphasis in original]

[26] In a recent copier industry publication new statistics were given for the 1990 placement of high volume copiers, which showed the market share of Kodak in this industry for the year 1990. In summary, *Dataquest Copier Faxts*, April 1991, pp. 1 and 16, stated as follows:

> In 1990 approximately 1,212,200 plain paper copiers were placed in the United States. The copier market has been divided into 7 segments, i.e. PC (up to 12 copies per minute (cpm)), 1 (up to 20 cpm), 2 (21-30 cpm), 3 (31-44 cpm), 4 (45-69 cpm), 5 (70-90 cpm), and 6 (91+ cpm). The definitions of the segments are found in *Dataquest Spec Check Competitive Copier Guide*, Spring 1991, at p. 9.
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> Kodak only places copiers in segments 4, 5, and 6. The average retail prices for copiers in these segments are $13,766, $17,745 to $75,000, and $78,300 to $220,000, respectively. In segment 4 Kodak placed 3,900 of the 88,900 copiers, in segment 5 Kodak placed 8,000 of the 18,900 copiers, and in segment 6 Kodak placed 1,200 of the 13,900 copiers.
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> In segment 5 the closest competitor to Kodak was Canon, which placed 5,000 copiers, and the next competitors were Konica and

As shown in the April 1991 *Dataquest Copier Faxts*, Kodak and Canon, its main competitor in Segment 5 of the copier market, account for approximately 65% of such market, and Kodak and Xerox, its main competitor in Segment 6, account for approximately 96% of such market. Kodak itself identified these companies as its main competitors (Pet.Br. p. 8).

These market shares of the high volume segments of the copier market do not indicate "fierce competition" for the recent year 1990 but rather market power, monopoly and duopoly.

Kodak does not sell equipment, parts and service as one package, i.e. "Kodak system," for one price.[27]

Mita, who each placed 1,500 copiers. Kodak accounted for approximately 44% of the copiers placed in this segment. Kodak and Canon together accounted for approximately 65% of such segment. This segment consists of highly featured copiers with an average monthly volume of 69,000 copies.

In segment 6 the largest market share was that of Xerox having placed 12,500 of the 13,900 copiers. Kodak placed 1,200 and the only remaining competitor, OCE, placed 200. Kodak and Xerox accounted for approximately 96% of such segment. This segment consists of copiers primarily used in central reproduction departments with an average monthly volume of 180,000 copies.

Segments 5 and 6 of the market are considered the high end of the market.

[27]Petitioner's Brief at p. 3 states:

"Like all sophisticated business equipment, Kodak's copiers and micrographs products require regular service and occasional repairs to function properly. J.A. 160, 179. So, as an integral part of its equipment sales business, Kodak sells service and makes or procures replacement parts used in service. Kodak provides service contractually, three different ways: (1) initial warranty service, included in the purchase price of the equipment; (2) annual service contracts, which include regular maintenance, repairs, and all necessary parts; and (3) time and material service on a "per call" basis. Kodak does not compel its equipment owners to purchase Kodak service. Indeed, Kodak customers who service their own equipment can purchase parts separately. J.A. 171-72, 190."

Although purchasers may consider service and parts costs to be an important component of total equipment costs (Pet.Br. pp. 3-4), such costs may not be readily known.

A consumer negotiating with Kodak for the "Kodak system" must negotiate numerous prices:

1) the equipment purchase price;

2) the annual service contract price each year if desired;

3) the time and material service prices "per call;" and

4) the parts prices.

All of these prices, other than the equipment purchase price, may change over the life cycle of the equipment.

The "total cost" of the "Kodak system" may also change if the purchaser purchases its parts from a source other than Kodak, and/or its service from an ISO.

Thus, even if the "total cost" of the "Kodak system" was known, the existence of the ISOs in the service marketplace requires Kodak to price its equipment at a competitive level, irrespective of the prices of parts and service.

Kodak may have adopted a different sales strategy (Pet.Br. pp. 6-7), however just the adoption of a strategy does not make such a market reality; nor does such strategy lead to the unquestioned assumption that competition is only for the "entire system" at an interbrand level.

It is more probable that the purchaser, if he does view the purchase as a "system," would compare the price of the original equipment at the interbrand level, i.e. Kodak, Xerox, or Canon; the price of service from all competitors, i.e. Kodak, Xerox, Canon, and ISOs; and the price of parts from all competitors. This probability is based upon the purchaser's experience in

the automobile and computer industries.[28] There does not appear to be any reason that the copier industry should be different.

It does not follow that a consumer, if having difficulty with Kodak's price for service, would go to Xerox or Canon to purchase all new equipment. In reality the consumer would go to an ISO, as in this case.

Only if ISOs do not exist and Xerox and Canon do not provide service on Kodak equipment, would the consumer consider scrapping the Kodak equipment and purchasing a competitor's equipment. However, even in this instance, the price of the competitor's equipment, parts, and service would have to be less than the cost to remain with Kodak for the remaining life of the machine (Pet.App. 11A).

B. Original Equipment Alone May Not Be the Relevant Market in Which to Measure Market Power

Neither Kodak copiers nor micrographics equipment are the tying product or the tied product. Thus unless the concept in tying arrangements of measuring market power is extended to measuring market power in a market that is not part of the tying arrangement, original equipment may not be the appropriate market to measure in this case.

Further, despite market shares having been given for the original equipment market only, Kodak itself does not limit its market claim to only original equipment.

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[28]Pet.App. 7A, referring to "*Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1480 n. 3 (9th Cir. 1986) (applying California law) (Noting that for some products, such as automobiles, the parts market is distinct from the service market), *modified* 810 F.2d 1517 (9th Cir. 1987); *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1339 (9th Cir. 1984), *cert. denied*, 473 U.S. 908, 105 S.Ct. 3534, 87 L.Ed.2d 657 (1985) (holding that separate markets existed for computer central processing unit and computer operating system)."

Kodak views the original equipment purchase market as one that encompasses service costs and parts costs as part of "total equipment costs" (Pet.Br. pp. 2-3). Figures were not given for this "total market."

None of the tying cases have adopted a theory of measuring the market power in the original equipment market when such equipment has not been part of the tying arrangement. To do so would appear to be an unwarranted extension of the market power analysis in tying cases, which was limited to only the products directly within the tying arrangement.

Alternatively, the claim that a manufacturer such as Kodak "cannot exercise market power in aftermarkets if it lacks market power in equipment markets comports with this Court's recognition in other contexts of the importance of interbrand competition,"[29] referring to vertical restraint cases, is not valid in a tying arrangement.

In "analogous" vertical integration cases, price is not a factor.[30]

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[29]Brief for the United States as Amicus Curiae Supporting Petitioner, p. 15.

[30]In *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988) ("*Sharp*"), the issue was one of whether a nonprice vertical restraint was per se illegal in the context of a manufacturer having terminated a discounting dealer at the behest of another dealer. In this context, the power to raise or lower prices in the interbrand market by the manufacturer was not a factor.

Further, the reliance in *Sharp* upon *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) ("*GTE*"), was related to the promoting of competent and aggressive retailers to make the kind of investment that is often required in the distribution of products unknown to the consumer. In particular, footnote 19 of *GTE*, referred to in *Sharp*, specifically emphasized the importance of the independence of intrabrand competition from interbrand competition confronting the manufacturer.

Footnote 19 states as follows:

The concepts of vertical integration cases such as *GTE* and *Sharp* only converge with the concepts in tying arrangements at that point in the early development of a product, when a tying arrangement may have been considered permissible for a new business to break into the market.[31] However, as shown in *Jerrold*, once the marketplace has developed, the tying arrangement of tying service to equipment sales was no longer justified.[32]

"Interbrand competition is the competition among the manufacturers of the same generic product - television sets in this case - and is the primary concern of antitrust law. The extreme example of a deficiency of interbrand competition is monopoly, where there is only one manufacturer. In contrast, intrabrand competition is the competition between the distributors - wholesale or retail - of the product of a particular manufacturer.

The degree of intrabrand competition is wholly independent of the level of interbrand competition confronting the manufacturer. Thus, there may be fierce intrabrand competition among the distributors of a product produced by a monopolist and no intrabrand competition among the distributors of a product produced by a firm in a highly competitive industry. But when interbrand competition exists, as it does among television manufacturers, it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product."

[31]See *Jefferson Parish*, 466 U.S. 2, 24, footnote 39, discussing *United States v. Jerrold Electronics Corp.*, 187 F.Supp. 545 (ED Pa.1960), aff'd (*per curiam*), 365 U.S. 567 (1961) ("*Jerrold*"), in which the majority stated, ". . . *Jerrold* also indicates that tying may be permissible when necessary to enable a new business to break into the market. See *id.*, at 555-558."

[32]Judge Van Dusen addressed this issue at 187 F.Supp. 558, as follows:

". . . It is content to say that, while Jerrold has satisfied this court that its policy was reasonable at its inception, it has failed to satisfy us that it remained reasonable throughout the period of its use, even allowing it a reasonable time to recognize and adjust its policies to changing conditions. [footnote omitted] Accordingly, the court concludes that the defendants' refusal to sell Jerrold equipment except in conjunction with a service contract violated § 1 of the Sherman Act during part of the time this policy was in effect. [footnote omitted]"

C. The Theory of Interbrand Competition Is Inapplicable When a Company Is the Sole Source of Its Aftermarket Parts

It is undisputed that many of the aftermarket parts for Kodak copiers are unique and only available from Kodak (Pet.App. 7A, 11A).[33]

If these parts were patented, the tying of other products to the sale of the patented part would be unlawful.[34]

Similarly, when a seller offers a unique product that competitors are not able to offer, the Court has held that the likelihood that market power exists and is being used to restrain competition in a separate market is sufficient to make per se condemnation appropriate.[35]

This condemnation of conduct related to "unique parts" which are not under a patent has not been withdrawn.

The primary cases cited by Kodak in support of interbrand competition do not refer to a unique product which could not be substituted, such as Kodak parts.[36]

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[33]Further, Kodak prevented ISOs from obtaining parts, as shown earlier.

[34]See *Jefferson Parish*, 466 U.S. at pp. 15-17 and cases cited therein, which discuss per se condemnation, the foreclosure of a substantial volume of commerce, and the unlawful existence of a patent monopoly.

[35]*Jefferson Parish*, 466 U.S. at pp. 17-19 and cases cited therein. See also p. 37, footnote 7, wherein O'Connor, J., concurring, states that the uniqueness factor might only help to give market power to a seller.

[36]In *General Business Systems v. North American Philips Corp.*, 699 F.2d 965 (9th Cir. 1983) ("*Philips*"), Philips would not provide warranty protection and service to computer owners who did not use the magnetic cards (MLC). The Court found, at p. 977, that

In the present case, the uniqueness of Kodak's replacement parts (the tying product) may trigger a presumption of market power. Physically the parts are unique and economically they are unique in that they are unavailable from other sources.

D. An Extension of the Definition of the Product Markets or the Relevant Market Is Not Appropriate

Kodak has not presented any reason or necessity to change the definition of the product markets or the relevant market in tying arrangement cases to extend such to encompass a market for an untied product, i.e. original equipment.

Philips did not have power to "raise prices or to require purchasers to accept burdensome terms that could not be enacted in a completely competitive market" [citation omitted] in the tying product (service).

In *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 799 (1st Cir. 1988) ("*Grappone*"), in which automobiles were tied to parts, the Court found that Subarus (the tying product) did not have any special or unique features such as patents or copyrights that might demonstrate market power.

In *A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673 (6th Cir. 1986) ("*A.I. Root*"), the Court held that substitute products existed for the tying product, reconfigured BOSS software, which was copyrighted.

In a case in which the parts were conceded to be unique, *Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228 (7th Cir. 1988) ("*Sterling*"), *cert. denied*, 110 S.Ct. 141 (1989), Sterling replacement parts (the tying product) were conditioned upon the purchase of a quota of Sterling motors (the tied product). Sterling had conceded that its replacement parts (the tying product) were unique (p. 232-233). The Court refused to reconsider the previous panel's interpretation of *Jefferson Parish* which was that physical uniqueness triggers the presumption of market power. Judge Posner, however, in his dissent rejected the effects of uniqueness based upon Sterling's small market share in the market for motors (the tied product) (p. 236).

The effect of any such extension would allow manufacturers to monopolize competitive aftermarkets which are related to their original equipment with impunity.

In essence, one can expect the service of automobiles to be monopolized by automobile manufacturers and their franchised dealers based upon the manufacturers' prohibition of selling parts, either directly or indirectly, to other service providers; the service of computers and high tech equipment to be monopolized by manufacturers based upon their refusal to sell parts to anyone other than the owners, who will not be allowed to resell such parts to TPMs; and the service of the consumer electronics industry's products to be monopolized by the manufacturers of such items, based upon their refusal to sell parts to anyone other than the consumer, who will not be allowed to resell such parts to TPMs.[37]

These prohibitions may be enforced by "boycott like" conduct similar to that presented by the record in this case, in which the third party manufacturers of the parts, the customers, and the brokers are precluded from selling such parts to TPMs to service equipment and products.

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[37]It is evident from even the limited state of the record that the Court of Appeals was correct in its decision to reverse the order of dismissal of the Trial Court. The theory that Kodak lacks market power in interbrand competition and therefore cannot engage in an unlawful tying arrangement or monopolistic conduct in the aftermarkets of parts and service, when viewed against the reality of the marketplace does not render Respondent's claims as implausible. Nor should Respondents be placed with the burden to "come forward with more persuasive evidence to support their claim than would be necessary." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) ("*Matsushita*").

The extension of the *Matsushita* burden to cases in which discovery has either been denied or truncated will have the effect of stifling the proper resolution of many valid claims.

The effect of this activity would be the disappearance of the competitive service industry and all of its price and efficiency benefits to consumers.

VI.

CONCLUSION

The case herein presents one of the most pressing issues with respect to the future direction of the United States economy, which is now service oriented. If the theory that a manufacturer may control the aftermarket of parts and service in its original equipment, to the exclusion of all viable competition prevails, the effect upon the United States economy will be drastic in both the immediate and the long-term future. Competition will vanish, productivity will diminish, efficiency will drop, prices will rise, and the general welfare of the consumer will irreparably suffer.

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I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11852 Santa Monica Boulevard, Suite 3, Los Angeles, California 90025; that on September 20, 1991, I served the within *Brief of Amicus Curiae* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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